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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-742

FOREMOST-MCKESSON, INC.,
Petitioner,

v.

PROVIDENT SECURITIES COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF ALLIS-CHALMERS MANUFACTURING COMPANY FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONER

S. HAZARD GILLESPIE
Counsel for Allis-Chalmers Manufacturing Company
1 Chase Manhattan Plaza
New York, New York 10005
Tel. No. (212) HA 2-3400

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Allis-Chalmers Manufacturing Company ("Allis") hereby respectfully moves the Court for leave to file the accompanying brief *amicus curiae*. Attorneys for respondent have indicated that they consent to the motion. The consent of the attorneys for the petitioner in whose behalf this brief is submitted, was refused.

THE DECISION BELOW

The opinion of the Court of Appeals is reported at 506 F. 2d 601 (9th Cir. 1974). The opinion of the District Court is reported at 331 F. Supp. 787 (N.D. Cal. 1971).

The Court of Appeals held that § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (the "1934 Act") did not apply to a purchase and sale of more than 10% of a class of equity securities of Foremost-McKesson, Inc. ("Foremost") which occurred within a period of less than six months, because Provident Securities Company

("Provident") had not been a 10% owner of such securities prior to its purchase. According to the Court, Provident was exempted from § 16(b) liability because it was not the beneficial owner of 10% of the shares of Foremost "both at the time of the purchase and sale."

THE INTEREST OF ALLIS-CHALMERS MANUFACTURING COMPANY

The interest of Allis arises from the fact that it is the plaintiff-appellant in an action currently pending in the United States Court of Appeals for the Seventh Circuit, entitled *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Ind., Inc.*, Nos. 74-1266 and 74-1267 (7th Cir., filed Feb. 12, 1974). In that action the District Court held that Gulf & Western Industries, Inc. ("G&W") had violated § 16(b) of the 1934 Act by reason of the voluntary purchase of 3,000,000 shares or approximately 29% of Allis' common stock in July, 1968 and the sale, less than six months thereafter on December 6, 1968, of that block together with an additional 248,000 shares purchased in September, 1968. Prior to its initial purchase of 3,000,000 shares of Allis' common stock in July, 1968, G&W had not owned any equity securities of Allis.

The question presented in the *Allis-Chalmers* and *Provident* cases is whether a purchaser of securities registered under the 1934 Act becomes subject to § 16(b) at the time he acquires that very interest which makes him a 10% shareholder, or only as to subsequent purchases followed by sales within six months.

QUESTIONS THAT MAY NOT ADEQUATELY BE PRESENTED BY THE PARTIES

In the instant case the respondent Provident was a personal holding company which determined in 1969 to liquidate and dissolve. Although Provident desired to have liquid assets to distribute, when it entered into an agreement with Foremost, Foremost required as a condition to

purchasing two-thirds of Provident's assets that Provident accept in part payment, Foremost convertible debentures to be issued for that purpose. Although Provident preferred to sell its assets for cash alone, "eventually it compromised and accepted convertible debentures, one half of which would be registered as soon as possible after closing so that the stock could be offered to the public." (506 F. 2d at 603).

Pursuant to the purchase agreement, Foremost delivered to Provident at the closing on October 15, 1969, $4,250,000 in cash and a Foremost debenture in the principal amount of $40,000,000 which was immediately convertible into common shares comprising more than 10% of Foremost's common stock. This debenture was subsequently split into two debentures in the principal amounts of $25,000,000 and $15,000,000. At the same time Foremost delivered a $2,500,000 debenture to an escrow agent on Provident's behalf. On October 20, 1969 Provident received an additional debenture in the principal amount of $7,250,000.

To accomplish its purpose of liquidation, on October 21, 1969, Provident entered into an underwriting agreement providing for the sale by it of the $25,000,000 principal amount of debentures it had received. On October 24, 1969, Provident distributed to its shareholders those debentures not commited under the underwriting agreement and ceased to be a 10% shareholder. On October 28, 1969, at the closing under the underwriting agreement, Provident received a check for $25,366,666.66 from the underwriters and in return delivered to them the $25,000,000 debenture (506 F. 2d at 603-04).

It was against this background of Foremost's insistence upon the form which this transaction assumed that the District Court, applying principles of equitable estoppel, said:

> "In all its essential details the form of the transaction was insisted upon if not dictated by Foremost, often contrary to the plans and wishes of Provident. If the matter had been handled as Provident wished, this case could never have arisen. To allow Foremost under these circumstances to recover the small profit of Provident (almost miniscule in terms of the total amounts involved) simply by a mindlessly literal application of Section 16(b) would be to perpetuate rather than correct an inequity. This the Court is unwilling to do." 331 F. Supp. 787, 792.

We do not quarrel with the opinion of the District Court, but wish to point out that the *Allis* case presents an altogether different picture, and one in which all of the equities, unlike the *Provident* case, are on the side of the issuer (Allis), whose shares were the subject of the short-swing trading. In the *Allis* case, G&W, a major conglomerate corporation, voluntarily and in furtherance of its own plans and pursuits, purchased 3,000,000 shares or over 29% of a publicly traded security (the common stock of Allis) and four and one-half months later voluntarily sold it along with 248,000 additional shares acquired after the initial purchase.

In January, 1969, Allis commenced suit under § 16(b) to recover the profits realized by G&W as a result of its short-swing trading in Allis shares. After trial without a jury the District Court found that G&W, following its initial purchase of 3,000,000 Allis shares, was in a position to obtain inside information "had it wanted to." *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Ind., Inc.*, 372 F. Supp. 570, 579 (N.D. Ill. 1974). It went on to hold that when G&W sold those shares within six months it violated Section 16(b) of the 1934 Act, and was required to account for the profits realized. *Id.* at 591.*

* Allis appealed from the District Court's determination of the amount of profits realized by G&W. G&W cross-appealed with respect to the issues of both liability and profits.

It is Allis' position that the voluntary purchases and sale of publicly traded securities involved in its case are far more common and likely to recur than the highly unusual set of transactions involved in *Provident*. It is also Allis' position that the very situation involved in its case, the voluntary purchase of a large block of securities followed by access to inside information and a sale thereof within a six month period, was precisely the situation intended to be covered by § 16(b). As a consequence, Allis is concerned that the important issue involved in the *Provident* case *not* be analyzed solely within its unusual factual context, but only after full consideration of its effect on the more typical fact pattern which the *Allis* case presents.

Therefore, we respectfully urge that Allis' motion be granted so that this Court will have before it the totally different factual situation presented in that case which will be affected profoundly by the result in *Provident*.

April 18, 1975

Respectfully submitted,

S. HAZARD GILLESPIE
Counsel for Allis-Chalmers Manufacturing Company
1 Chase Manhattan Plaza
New York, New York 10005
Tel. No. (212) HA 2-3400

BRIEF IN SUPPORT OF THE POSITION OF THE PETITIONER

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1974. The petition for a writ of certiorari was filed on December 16, 1974 and was granted on February 18, 1975.* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the purchaser in a single transaction of more than 10% of the equity securities of an issuer, who theretofore has owned none of said securities but within six months sells the entire block, is liable under § 16(b) of the 1934 Act to return to the issuer any short-swing profits realized?

STATEMENT

We accept and will not repeat the statements of the case as set forth by both the petitioner and respondent in their briefs filed in connection with the petition for writ of certiorari.

STATUTE INVOLVED

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b) (the "1934 Act"), provides in pertinent part:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months,*** shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

* We understand from counsel for Provident that in their brief they intend to take the position, as they did before the District Court and Ninth Circuit, that § 16(b) is inapplicable to the transaction at issue because the transactions involved were without potential for speculative abuse. *See Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973).

ARGUMENT

I

The Cases And Policy Of § 16(b) Require That The Words "At The Time Of" Be Construed To Cover The Initial Transaction By Which A Shareholder Aquires His 10% Interest

The opinion of the Ninth Circuit in the *Provident* case accords with no other Circuit or District Court* which

* *Arkansas-Louisiana Gas Co.* v. *W.R. Stephens Inv. Co.*, 141 F. Supp. 841 (W.D. Ark. 1956), is the lone District Court case which supports the result of the Ninth Circuit. It has been overruled, *sub silentio*, by *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F. 2d 918 (8th Cir. 1970), *aff'd on other grounds*, 404 U.S. 418 (1972).

has been faced with the precise issue of the applicability of § 16(b) to an initial purchase by which the purchaser becomes a more than 10% beneficial owner of securities followed by a sale within less than six months. *See, e.g., Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F.2d 918, 922-24 (8th Cir. 1970), *aff'd on other grounds*, 404 U.S. 418 (1972); *Perine* v. *William Norton & Co.*, 509 F.2d 114, 118 (2d Cir. 1974); *Newmark* v. *RKO General, Inc.*, 425 F.2d 348, 355-56 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970); *Stella* v. *Graham-Paige Motors Corp.*, 104 F. Supp. 957 (S.D.N.Y. 1952), *aff'd in part, remanded in part on other grounds*, 232 F.2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956).

Moreover, this Court itself has indicated in its most recent decision involving § 16(b), *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 584 (1973), that

> "Unquestionably, one or more statutory purchases occur when one company, seeking to gain control of another, acquires more than 10% of the stock of the latter through a tender offer made to its shareholders."

and that

> "By May 10, 1967 Occidental had acquired more than 10% of the outstanding shares of Old Kern. It was thus a statutory insider when, on May 11, it extended its tender offer to include another 500,000 shares." *Id.* at 598.

Without question, it would not have been necessary for this Court to reach the issue as it did in that case of whether Occidental had made a "sale" for purposes of § 16(b) had it not first determined that in acquiring its initial more than 10% interest in Old Kern, it had made a § 16(b) "purchase".

Most importantly, the result in *Provident* is directly contrary to the Congressional purpose and the policy of § 16(b) of preventing the possibility of abuse of inside information which may be obtained by a class of insiders solely as a result of its relationship to the issuer. Further it impairs severely the protections § 16(b) provides the investing public by supplying an easy mode of evasion and insulation from liability for large shareholders such as G&W who have the requisite access to confidential information solely by virtue of their large stock holdings. *See, e.g.*, 2 L. Loss, SECURITIES REGULATION 1060 (2d ed. 1961) (". . . it is difficult to quarrel with the [Second Circuit's] preference for the construction which would serve to effectuate the legislative purpose and still leave some meaning for the statutory language when there is an ambiguity . . .") and Cook & Feldman, *Insider Trading Under the Securities Act*, 66 Harv. L. Rev. 612, 631-32 (1953).

In the recent case of *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F.2d 918 (8th Cir. 1970), *aff'd on other grounds*, 404 U.S. 418 (1972), Emerson purchased 13.2% of the outstanding common stock of Dodge Manufacturing Corporation on June 16, 1967. It owned no stock of Dodge at the time of this single purchase. Dodge thereupon arranged a defensive merger with Reliance. Emerson, faced with the prospect of a forced exchange of its Dodge shares for stock in the merged corporation, took steps to mitigate its § 16(b) liability by selling, on August 28, 1967, 37,000 shares—or 3.24%—of the outstanding stock of Dodge, thereby reducing its holdings to 9.96% of the outstanding stock.

In determining whether the purchase by which Emerson became a more than 10% shareholder subjected it to § 16(b), the Eighth Circuit held:

> ". . . we have concluded that the purchase by which a security holder acquires a more than 10 percentum status is included as a part of a pair of transactions of purchase and sale occurring within six months of each other within the meaning of Section 16(b). Any other view has the weakness of impracticability of application of the statute, a result we should not lightly attribute to a Congress striving to prevent what it considered to be highly undesirable speculations by certain security owners who are in position to obtain or to be exposed to that kind of inside information lending itself to speculative use to the possible detriment of the public." 434 F.2d at 924.

The issue of whether Emerson's purchase of 13.2% of the outstanding stock of Dodge—at a time when Emerson did not own any Dodge stock—brought Emerson within the reach of § 16(b) was not before this Court on appeal and this Court expressly declined to decide it. However, with regard to Emerson's step sales, this Court held that the language of § 16(b) "at the time of the purchase and sale" meant exactly that and thus the second sale, effected while the defendant was the holder of less than 10% of the issuer's stock, was not intended to be covered by § 16(b).

In approving the technique of the step sale transaction by a beneficial owner of more than 10% of the outstanding stock of a company, this Court indicated that the Statute does not foreclose the possibility of the mitigation of damages by step sales. Similarly, it can be said that the exemption "both at the time of the purchase and sale," requires no different interpretation with respect to "stepped up" purchases of the stock of an issuer . Thus for example the purchaser of 9% of the securities of an issuer who shortly thereafter makes a second purchase of an additional 2% or

3% of those securities becomes subject to § 16(b) only on the occasion of the second purchase.* Here G&W in acquiring and disposing of more than 29% of the shares of Allis in one purchase and one sale is not entitled to an exemption for either a "stepped up" purchase or a "stepped down" sale. G&W's conduct was precisely the kind of conduct that § 16(b) prohibits.

Stella v. *Graham-Paige Motors Corp.*, 104 F. Supp. 957, *aff'd in part, remanded in part*, 232 F. 2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956), was the first case in which a court was required to grapple with the meaning of the "at the time of the purchase and sale" language of § 16(b). In that case, Graham-Paige, the owner of 6¼% of the outstanding shares of Kaiser-Frazer Corporation, purchased in a single transaction a sufficient number of shares to increase its holdings to 21% of all the outstanding stock. Less than six months later, Graham-Paige sold part of its holdings, and suit was brought to recover profits under § 16(b) of the 1934 Act. On its motion for summary judgment, Graham-Paige contended

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* This Court in *Emerson*, 404 U.S. at 423 n. 3 cites with approval 2 L. Loss, SECURITIES REGULATION 1060 (2d ed., 1961) with respect to step sales. The full text covers both step purchases and step sales.

> "A substantial 'out' nevertheless remains for the 10 percent holder: If a person who is not an insider wants to acquire up to, say, 15 percent, he should buy up to just under 10 percent in one transaction (which will be exempted even under the court's construction [in *Stella* v. *Graham-Paige Motors Corp., infra*]) and then buy the remaining 5-plus percent in a separate transaction. Conversely, a person who owns 15 percent and wants to sell down to 5 percent should sell 5-plus percent in one transaction and then, after he becomes a holder of slightly less than 10 percent, sell out the remainder."

that the purchase and sale involved in the action were exempt from § 16(b) because it was not the beneficial owner of more than 10% of the Kaiser-Frazer stock both at the time of the purchase and sale.

The Court determined that the Congressional purpose underlying the enactment of § 16(b) was clear. Congress intended to protect outside stockholders against short-swing speculation by insiders with advance information and thus:

> "If the construction urged by defendant is placed upon the exemption provision, it would be possible for a person to purchase a large block of stock, sell it out until his ownership was reduced to less than 10%, and then repeat the process, ad infinitum. A construction such as this would provide a way for the evasion of § 16(b) by principal stockholders, and render it largely ineffective to prevent some of the financial evils which led to the passage of this legislation by Congress." 104 F. Supp. at 959.*

The Court then held that if the words of § 16(b) "at the time" were construed to mean "simultaneously with" rather than "prior to" the purchase by means of which a shareholder becomes 10% beneficial owner,

> ". . . a shareholder would become subject to the provisions of § 16(b) as soon as his ownership exceeded 10% of the outstanding shares. This construction would be consistent with the declared purpose of the statute to prevent the unfair use

* The Ninth Circuit attempts to resolve this problem by claiming that § 16(b) would be applicable to an initial 10% or better purchase if such purchase is in effect a "repurchase" 506 F. 2d at 614-15. It is submitted that the framers of § 16(b) had no intention of establishing two separate and inconsistent applications for the Statute. Further, such an interpretation conflicts with the objective approach to the meaning of the language of § 16(b) taken by this Court in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972).

> of inside information by officers, directors, or stockholders owning more than 10% of the equity stock." 104 F. Supp. at 960.

It is Allis' position that the statutory language and the remedial purpose sought to be achieved by the enactment of § 16(b) support the contention that the statute is applicable simultaneously with the purchase by which one becomes a more than 10% beneficial owner of an issuer's securities. We submit that for this Court to affirm the *Provident* case would be to erase much of the protection now offered the investing public by § 16(b). The view of § 16(b) espoused by the Ninth Circuit would permit untrammeled speculation by large security owners who are in a position

> ". . . to obtain or to be exposed to that kind of inside information lending itself to speculative use to the possible detriment of the public." *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F.2d 918, 924 (8th Cir. 1970), *aff'd on other grounds*, 404 U.S. 418 (1972).

We urge that such a position not be adopted by this Court.

II

The Legislative History Of § 16(b) Relied Upon By The Ninth Circuit In Its Opinion Cannot Withstand Close Scrutiny

In its opinion, the Court of Appeals for the Ninth Circuit extracts from the legislative history of § 16(b) evidence of a non-existent Congressional intent.* To reach this result, the Court relies on the testimony offered in

* It should be noted that this Court determined that "the legislative history affords no explanation of the purpose of the proviso". *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 424 (1972).

hearings held only in connection with the following version of § 16(b):

> "(b) It shall be unlawful for any director, officer or owner of securities, owning as of record and/or beneficially more than 5 per centum of any class of stock of any issuer, any security of which is registered on a national securities exchange—
>
> (1) To purchase any such registered security with the intention or expectation of selling the same security within six months; and any profit made by such person on any transaction in such a registered security extending over a period of less than six months shall inure to and be recoverable by the issuer, irrespective of any intention or expectation on his part in entering into such transaction of holding the security purchased for a period exceeding six months." S.2693 (H.R. 7852), 73d Cong., 2d Sess. (1934).

On the basis of this single draft, the Ninth Circuit concludes that § 16(b) was

> ". . . originally designed to deter insiders from purchasing stock without any intention of making a long-term investment, but only with the intention of profiting from upward fluctuations in the market price that were predictable on the basis of inside information. The section was directed against an insider who has no intention of changing his investment relationship to the corporation, but rather has an 'intention or expectation' to purchase and sell the stock within six months. After the pair of transactions is completed he intends to own exactly the same interests in the corporation as he owned before he began his speculative venture." (506 F. 2d at 609)

The Ninth Circuit, however, has neglected a vital fact in its analysis of the legislative history of § 16(b). The language upon which the Court predicates its conclusion is

drawn from a Senate bill (S. 2693) which never became law—a bill which in fact never received a single vote on the floor of either house of Congress. The present language of § 16(b) can be traced to a different bill (H. R. 8720), which was introduced in the House of Representatives almost a month *after* the hearings quoted and erroneously relied upon by the Ninth Circuit. The new bill reflected several major changes from the prior version, but most important for our purposes, was its elimination of the language that would have tended to limit its application to transactions involving shareholders with pre-existing 10% holdings.

The legislative history gives no indication whatsoever of the reason for deletion of the language relied on by the Ninth Circuit. That Court speculates that this change was made to "ameliorate this difficulty of *proving* intention or expectation" (506 F. 2d at 611; emphasis added), but not to "alter the section's goal of deterring insiders from speculating on the basis of inside information obtained because of 'substantial stockholdings' ". (506 F. 2d at 610).

This explanation, however, is unsatisfactory. It is clear from a review of all of the draft proposals for § 16(b) (see S.2693, H.R. 7852, H.R.8720, S.3420 and H.R. 9323, 73d Cong., 2d Sess. (1934), that *all* were intended to create an irrebuttable presumption of intent, to be inferred solely from the fact of a short-swing purchase and sale. *See, e.g.*, Hearings on S. Res. 84, S. Res. 56 and S. Res. 97 Before the Sen Comm. on Banking and Currency, 73d Cong., 2d Sess., pt. 15, at 6554 (1934) (hereinafter 1934 *Hearings*). Thus, the deletion of the "intention or expectation" language had no effect on the burden of proof.

Still less satisfactory is the Ninth Circuit's curious assumption that by eliminating language which would have

limited the scope of the new law, Congress intended to preserve precisely that limitation. The logical inference is quite the contrary—that Congress intended to *broaden* the bill. Such an extension would be consistent with the contemporaneous change to proscribe sales followed by short-swing purchases as well as purchases followed by short-swing sales.

In view of Congress' silence on this point, the only thing that can be said with any real certainty is the language upon which the Ninth Circuit premises its reading of Congressional intent was deleted in its entirety from the bill *before* passage by either House, and cannot by its absence limit the intended scope of the bill that *was* passed.

Clearer evidence that Congress *did* intend to bring within the ambit of § 16(b) shareholders who acquire their 10% interests *without* having had a prior relationship to the issuer, can be found in the concern expressed during the hearings on the House draft (which is substantially similar to the version of § 16(b) which was enacted) that the section:

> ". . . might prevent arbitrage transactions, because it is very common, in arbitrage, for a man to buy one security and at the same time sell against it an equivalent security. While that process of the arbitrage is going on he might conceivably accumulate more than 5 percent of this security, and he would, of course, be the beneficial owner of that 5 percent. He would, of course, have offsetting contracts or obligations against it, but they are not reflected in the definition which imposes penalties on a stockholder owning 5 percent or more of a registered security." 1934 *Hearings* at 7567 (Statement of Roland L. Redmond, Attorney for the New York Stock Exchange, on S. 8720).*

* The bill as enacted increased the requisite holding from 5% to 10% of the issuer's equity securities.

At the hearing, it was suggested to the Congress that the above problem (which would not arise if the position of the Ninth Circuit were correct) could be remedied by providing at the foot of the bill a provision enabling the commission charged with enforcing it to exempt arbitrage transactions from the force of the Section (1934 *Hearings* at 7567). However, Section 16(e), included in the text of the bill itself, provided *precisely* such an exemption. Moreover, § 16(d) expressly exempted from § 16(b):

> "any purchase and sale, or sale and purchase, . . . of an equity security *not then or theretofore held by him in an investment account*, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market . . . for such security". (emphasis added).

Both of these express provisions are strong evidence that Congress intended to cover by § 16(b) that very transaction making a stockholder a 10% stockholder, for if Congress thought otherwise, neither exemption would have been necessary.

Another provision suggested by witnesses at the hearings, that the administrative body charged with enforcement be empowered to exempt certain transactions, is included in the text of § 16(b) itself:

> "This subsection shall not be construed to cover . . . any transactions which the Commission by rules and regulations, may exempt as not comprehended within the purpose of this subsection."

Pursuant to this authority, the SEC has by Rule 16b-2 (17 C.F.R. § 240.16b-2) exempted from the embrace of § 16(b) certain transactions engaged in by underwriters. Clearly no such rule would have been necessary if the Section means what the Ninth Circuit has held it to

mean. Moreover, the existence of such a rule is strong evidence that the SEC interpreted § 16(b) as otherwise applicable to such a transaction. See *Perine* v. *William Norton & Co.*, 509 F. 2d 114 (2d Cir. 1974).*

In summary, the legislative history, to the extent that it bears upon this issue, supports the conclusion that Congress intended to include in the proscriptions of § 16(b) all acquisitions of stock which have the effect of carrying the purchaser's ownership above the 10% mark. Accordingly, we respectfully urge that the Ninth Circuit's erroneous view as to Congress' intent not be accepted by this Court.

CONCLUSION

We respectfully submit that this Court should not affirm the judgment below on the grounds expressed by the Ninth Circuit in its opinion.

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Respectfully submitted,

S. HAZARD GILLESPIE
Counsel for Allis-Chalmers Manufacturing Company
1 Chase Manhattan Plaza
New York, New York 10005
Tel. No. (212) HA 2-3400

* Interpretive rules and practices of the agency charged with the administration and enforcement of a statute are accorded authoritative weight. *See, e.g., Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945); *Commissioner* v. *Estate of Sternberger*, 348 U.S. 187, 199 (1955).